Enforceability of Contracts

As discussed, a contract in China refers to an agreement made by the parties for undertaking certain civil activities. From the Chinese viewpoint, an agreement represents the mutual consensus of the parties involved, which is more than merely a promise or set of promises.\(^1\) Thus, the Contract Law is intended to enforce an agreement that is the product of mutual promises made by the parties. It is commonly understood in China that the very focus of the Contract Law is on voluntary undertakings by both parties to a contract, not simply one promise made by either party.

In contract literature, attempts have been made to draw a line between a promise and a contract. In one respect, a contract is considered to represent a social institution of agreement-making, while a promise is seen as a social institution of a more informal kind. In another respect, a contract, once made, is backed by the coercive power of the State. A promise, however, is supported by moral arguments and its enforceability is based on “an artificial virtue” or morality.\(^2\) In China, courts typically require contracts to be the product of mutual commitments from the two sides in contrast to promises, which are basically one-sided.\(^3\)

Though a contract is an agreement, not every agreement is an enforceable contract. Under the Contract Law’s definition, a contract must contain at least two elements: 1) it must be a voluntary undertaking by parties of equal status, and 2) it must be for the purpose of creating, modifying, or terminating relations of civil rights and obligations. Note that like the contract legislation in all other civil countries, the Contract Law does not require a consideration for the formation of a contract.

Therefore, to be enforced as a contract, an agreement must meet the statutory requirements. To be more specific, to be enforceable, an agreement must

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\(^1\) In the United States, the Restatement (Second) of Contracts defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” § 1. Also under the Restatement, a promise is termed as “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” § 2(a).


not involve any improper activities such as criminal offences and must not be used to further any illegal purposes. In addition, for purposes of the Contract Law, an agreement, to be enforced as a contract, must not involve relationships of personal status such as marriage, adoption, or guardianship.\textsuperscript{4}

A contract, once made, is generally enforceable unless its enforceability is precluded under the law. Regarding the enforceability of contracts, Article 8 of the Contract Law specifically provides that, when a contract is established in accordance with the law, it is legally binding on the parties. Article 8 further provides that the parties must perform their respective obligations in accordance with the terms of the contract and neither party may unilaterally modify or rescind the contract without the other party’s consent.

The text of Article 8 of the Contract Law is adopted \textit{verbatim} in Article 119 of the 2017 \textit{gpcl}, which reiterates the binding force of a contract that is legally formed. Article 8 of the Contract Law and Article 119 of the 2017 \textit{gpcl} both emphasize that a contract concluded in accordance with the law is fully enforceable. A contract being fully enforceable means that the law protects the rights arising out of the contract and also safeguards the performance of the contract so that the parties’ expectations will be met.

The Contract Law deals with the issue whether a contract is enforceable in different aspects. First, the statute contains provisions that specifically address the enforceability of contracts. Pursuant to the Contract Law, a contract is enforceable if it is made by the mutual assent of the parties. As noted, the mutuality between the parties is considered to be the essence of a contract. The Contract Law requires that a contract be made on the basis of equality and voluntariness. Article 13 of the Contract Law explicitly provides that parties must conclude a contract in the form of an offer and acceptance. Article 25 further provides that a contract is concluded when the acceptance becomes effective. Again, it is important to bear in mind that, in China, a contract need not be supported by consideration to be enforceable.

Second, the Contract Law adopts the doctrine of performance to deal situations where there is imperfection in contract formation. Under this doctrine, a contract that is otherwise unenforceable becomes enforceable if one party has performed its principal obligations under the contract and the other party has accepted that performance. The application of this performance doctrine mainly cures any formality defects in contracts. The Contract Law requires certain formalities to be observed in order for a contract to be valid.

\textsuperscript{4} Under Article 2 of the Contract Law, agreements involving marriage, adoption, and guardianship shall apply the provisions of other laws.